

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues)
Against:)

ABRAHAM HAFIZ RODRIGUEZ)

Case No. 800-2018-041142

Applicant.)
_____)

**DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by Abraham Hafiz Rodriguez, and the time for action having expired at 5:00 p.m. on April 19, 2019, the petition is deemed denied by operation of law.


Kimberly Kirchmeyer
Executive Director
Medical Board of California

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

ABRAHAM HAFIZ RODRIGUEZ,

Applicant.

Case No. 800-2018-041142

OAH No. 2019010014

DECISION AFTER NON-ADOPTION

Administrative Law Judge (“ALJ”) Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on August 29 and 30, 2018, in Oakland, California.

Lawrence Mercer, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California.

Marvin Firestone, M.D., Attorney at Law, represented applicant Abraham Hafiz Rodriguez, who was present.

The matter was submitted for decision on August 30, 2018.

On September 27, 2018 ALJ Schlichtmann issued her Proposed Decision. Panel B of the Medical Board of California (“Board”) declined to adopt the Proposed Decision and on October 30, 2018 issued its Order of Non-Adoption of Proposed Decision and afforded the parties the opportunity for written argument. Panel B fixed the date of oral argument for January 31, 2019. The Board having read and considered the administrative record and the written arguments submitted by the parties, and having heard oral argument, hereby renders its decision in this matter.

FACTUAL FINDINGS

Introduction

1. On July 13, 2017, Abraham Hafiz Rodriguez (applicant) filed an application for a physician’s and surgeon’s certificate with the Medical Board of California (Board). Having concluded that applicant had deficiencies in the qualifications, functions and duties of a physician and surgeon as demonstrated by his failure to complete a neurosurgery residency, the Board denied the application on February 12, 2018.

2. Complainant Kimberly Kirchmeyer, Executive Director of the Board, filed the statement of issues in her official capacity on March 27, 2018. Applicant appealed the denial and

this hearing followed.

Applicant's Education

3. Applicant earned a Bachelor of Science degree in biology at the University of Iowa in 2009. During his undergraduate education, applicant contributed over 100 volunteer hours to the University of Iowa Hospital and also worked as a nursing aide.

4. Applicant graduated from the University of Illinois College of Medicine (UICOM) in 2013. Applicant was a member of the Alpha Omega Alpha Honor Medical Society at UICOM. The Dean's Letter dated October 1, 2012, describes applicant's performance at UICOM; it reports that applicant performed at the top of his class academically, served as a representative in the student government association during all four years of medical school, and was active in the student section of the American Medical Association, becoming the president of the section at UICOM. Applicant also co-founded the Journal Club at UICOM.

Applicant participated in various community service projects while attending medical school; he helped implement events and programs for the Student Wellness Committee; completed a suicide prevention training course; was instrumental in coordinating public health screening events; and participated in food, clothing and blood drives, recycling initiatives, and youth fitness and education programs. Applicant participated in clerkships in internal medicine, pediatrics and in obstetrics and gynecology at OSF Saint Francis Medical Center; and clerkships in surgery, family medicine and psychiatry through the Rural Student Physician Program.

In 2010, applicant was selected for the Edmund James Scholar Program, an academic honors program at UICOM. Under the supervision of members of the faculty in the Department of Neurology, applicant engaged in a pilot study to investigate the effects of music on alpha and theta wave activity in the human cerebral cortex.

5. As a result of collaborating with UICOM professors, applicant published two peer reviewed articles: *True synovial cysts of the lumbar spine: an epiphenomenon of instability of the functional spine unit?*, published in Neurosurgical Review in July 2013; and *Music therapy as an adjuvant therapeutic tool in medical practice: an evidence-based summary*, published in OA Evidence-Based Medicine in April 2013.

6. Applicant passed the United States Medical Licensing Examination (USMLE) Step 1 with a score of 251 (minimum passing score was 188) on June 23, 2011. He passed the USMLE Step 2 with a score of 237 (minimum passing score was 189) on June 28, 2012. He passed the clinical skills portion on January 7, 2013. On May 27, 2014, applicant passed the USMLE Step 3 with a score of 193 (190 needed to pass).

7. Applicant was licensed as a physician and surgeon for training in the State of Missouri from 2013 until June 30, 2017; he did not apply to renew the license in 2017.

Alcohol-Related Offenses

8. On November 11, 2004, in the State of Iowa, applicant was discovered to be under the influence of alcohol in a running vehicle. He refused chemical tests. Applicant was convicted of operating a vehicle while intoxicated. Applicant was ordered to serve 48 hours in custody, complete a 12-hour drinking driver course and pay a fine of \$1,000. Applicant was 18 years old and in college at the time.

9. On February 28, 2006, applicant was cited in the State of Iowa for using false identification to purchase alcohol and for possessing alcohol under the legal age (applicant was 19 years old).

Residency Training at the University of Missouri

10. Applicant was matched to the neurosurgery residency program at the University of Missouri Division of Neurosurgery. He entered the seven-year program on July 1, 2013. The Program Director at the time was N. Scott Litofsky, M.D., F.A.C.S. (Dr. Litofsky or Program Director).

11. The purpose of a residency is to train a medical school graduate in a particular specialty. Residency programs are governed by the Accreditation Council for Graduate Medical Education (ACGME). The programs follow common rules and regulations; the curriculum is guided by specialty specific regulations.

12. The Program Director is responsible for meeting the ACGME regulations and for ensuring that residents achieve competency in the “core competencies.” The core competencies were developed by the ACGME 15 years ago to provide clarity in achieving competence. The core competencies are: 1) patient care; 2) medical knowledge; 3) practice-based learning and improvement; 4) interpersonal and communication skills; 5) professionalism; and 6) systems-based practice. Several years ago the ACGME implemented milestones, which are intended to develop more specific measures of competence in the core competencies. The milestones are a work in progress currently; more specificity is underway. Program Directors are required to evaluate a resident’s progress in the core competencies and milestones at least semiannually, and to provide feedback to the residents concerning their progression and areas for remediation.

13. On December 31, 2013, Dr. Litofsky wrote a letter to applicant evaluating his progress in post-graduate year one (PGY1 or internship). Dr. Litofsky rated applicant’s performance in the six core competencies based on input from assessments by supervising faculty, nursing and clerical staff, and applicant’s operative case log. Residents are rated in categories of “beginner,” “early learner,” “competent,” “proficient,” and “expert.”

Dr. Litofsky rated applicant’s patient care as between the beginner and early learner categories, and provided examples of skills in which applicant needed to improve. Dr. Litofsky rated applicant’s medical knowledge as slightly above the beginner level, noting that with further experience applicant was expected to improve. In the area of practice-based learning and improvement, Dr. Litofsky rated applicant as between the beginner and early learner levels; he recommended that applicant continue scholarship activities while at the university. Dr. Litofsky rated applicant at the level of early learner in the category of interpersonal and communication skills, and recommended that applicant refrain from arguing

points with others. Applicant was rated as between early learner and competent in the category of professionalism, and as early learner in systems-based practice. Dr. Litofsky concluded by noting that applicant's milestones for the array of competencies were appropriate for his level of training, he was proud to have applicant in the program and looked forward to his continued development.

14. On June 16, 2014, Dr. Litofsky again evaluated applicant's progress. He found applicant's performance to be appropriate for his level of training. He reiterated that applicant needed to engage in scholarship activities at the university. Dr. Litofsky noted that applicant's operative case log showed minor procedure numbers that were somewhat below expected. Dr. Litofsky rated applicant as follows: patient care – beginner; medical knowledge, practice-based learning and improvement, interpersonal and communication skills, and professionalism – early learner; and systems-based practice – between beginner and early learner. Applicant had successfully completed his PGY1 training.

15. Applicant took the 2014 American Board of Neurological Surgery Primary Examination for practice, not for credit. He received a score of 222; a score of 286 was needed to pass. Dr. Litofsky commended applicant for scoring quite well on this examination for his level of training.

16. On December 29, 2014, Dr. Litofsky provided applicant with an evaluation of the first half of his PGY2 training. Dr. Litofsky reported that applicant was on track for his level of training; he recommended additional focus on areas applicant had mentioned in his self-assessment. The major concern expressed by the faculty was sleepiness that applicant demonstrated in conferences, in the operating room and during meetings. Dr. Litofsky recommended that applicant be assessed by a professional for sleep hygiene. On the core competencies, Dr. Litofsky rated applicant as between beginner and early learner stages for patient care and practice-based learning and improvement, and at early learner in the remainder of the core competencies.

17. Applicant took the 2015 American Board of Neurological Surgery Primary Examination, again for practice. He received a score of 300; a score of 311 was needed to pass. Dr. Litofsky considered this to be an excellent score for applicant's level of training; however, he raised a concern with applicant's ability to translate his knowledge to the clinical setting.

MAY 17, 2015 LETTER OF WARNING

18. On May 17, 2015, Dr. Litofsky evaluated applicant's progress in the second half of his PGY2 training. For the first time, Dr. Litofsky reported that applicant's performance was well below the level of a resident at that point in training. He issued applicant a Letter of Warning to highlight the importance of prompt correction of deficiencies. Dr. Litofsky rated applicant at the beginner level in the six competencies. He provided detailed examples of applicant's deficiencies in each category. Many of the complaints involved applicant's perceived ineffective communications skills and an inability to be a team player. Dr. Litofsky again encouraged applicant to engage in scholarship activities with members of the faculty. He noted that applicant's surgical experience was somewhat hampered by the program being unable to

schedule a rotation for applicant at CoxHealth in Springfield, and the need for applicant to stand in for a physician's assistant who had left the division; nevertheless, he cautioned applicant that he needed to: 1) improve his listening skills; 2) timely accomplish tasks; 3) reduce unnecessary activities; 4) follow instructions from senior peers; 5) be on time; 6) participate as a team member; 7) pay attention on rounds; 8) identify the key elements of patients' imaging and physical examination and integrate them into an appropriate diagnostic inventory; 9) effectively communicate to senior residents and attendings; and 10) learn to prioritize tasks so as to stay focused.

OCTOBER 12, 2015 PROBATIONARY STATUS

19. On October 12, 2015, Dr. Litofsky placed applicant on probation. He reported that over the previous three months applicant's rotations had been tailored to give a number of faculty members an opportunity for direct educational contact with him so that deficiencies could be pointed out and discussed immediately. Dr. Litofsky reported that applicant had continued to perform well below a resident in his third year of postgraduate training. He attached a list of the 10 items identified in the Letter of Warning accompanied by examples of the deficiencies observed.

Typical examples included the following: placing the informed consent in the wrong patient medical record; miscommunicating his role to the chief resident; placing a compact disc in a phantom chart instead of giving it to the clinical nurse as instructed; forgetting a conference discussion; forgetting which side of a planned biopsy was discussed the day prior; failing to discuss a case until 7:30 p.m.; failing to update an attending after morning rounds until 12:45 p.m.; presenting too much minutiae during clinic presentations; arguing with an attending physician; being late to rounds; parking in the visitor garage; failing to perform a fundi examination on a patient; and falling asleep in the middle of a case.

Dr. Litofsky advised applicant that the faculty remained hopeful that he would be able to appropriately address their concerns. However, the faculty felt that a specialty such as neurosurgery, which requires meticulous attention to detail, timely accomplishment of tasks, clearly following instructions, effective communication, and prioritization of critical tasks, might not be the best career choice for applicant. Dr. Litofsky strongly advised applicant to consider other options and pledged the support of the faculty if applicant chose to change his specialty.

20. On December 31, 2015, Dr. Litofsky evaluated applicant's performance from July through December 2015. He reported that applicant had improved to the early learner stage in the categories of medical knowledge, practice-based learning and improvement, interpersonal and communication skills, professionalism and systems-based practice. He rated applicant at between beginner and early learner in patient care. Dr. Litofsky found applicant's operative case log to be appropriate. He commented that applicant was bright and willing to do the work to be a successful physician and neurosurgeon. Dr. Litofsky reported applicant's weaknesses to include a difficulty in focusing on the key points of medical knowledge and patient care. He also found applicant to be somewhat robotic in his technical components of following instruction. Applicant had improved in the 10 areas of concern, but still needed to develop. His probation was continued.

21. Applicant took the 2016 American Board of Neurological Surgery Primary Examination for credit; he passed with an extremely high score of 505; a score of 311 was

passing.

22. On June 30, 2016, Dr. Litofsky evaluated applicant's performance between January and June 2016. Dr. Litofsky reiterated concerns with applicant's ability to focus and apply his medical knowledge in the clinical setting. Applicant's score on patient care, practice-based learning and improvement, interpersonal and communication skills, and systems-based practice remained between beginner and early learner; his professionalism was at early learner. Applicant's operative case log was satisfactory. Dr. Litofsky concluded by stating that the faculty still had significant concerns about his ability to become a successful neurosurgeon, citing applicant's inability to interface well with peers and follow instructions of the faculty in the stressful work environment of neurosurgery. Applicant was assessed at well below his entire peer group. Applicant was cautioned that he needed to demonstrate significant improvement in his character to gain the trust of the faculty.

DECEMBER 29, 2016 FINAL EVALUATION

23. On December 29, 2016, Dr. Litofsky advised applicant that based on the assessment of his progress from July to December 2016, his contract would not be renewed and he was being removed from the clinical neurosurgical service. Dr. Litofsky described applicant as failing to improve in the six competencies and provided examples of applicant's continued deficiencies. In patient care, for example, Dr. Litofsky stated that applicant continued to be "unable to grasp the big picture," missed "key neurological findings," "provided poor transition of care," and difficulty completing responsibilities in a timely manner. With regard to medical knowledge, he found applicant had difficulty linking his knowledge to clinical circumstances. Concerns in practice-based learning and improvement were that applicant failed to engage in scholarly activities. With regard to interpersonal and communication skills, Dr. Litofsky reported, among other things, that applicant had made errors in documentation and failed to follow through on tasks, and that the faculty did not trust applicant to provide reliable information. Dr. Litofsky also stated that applicant's professionalism was hurt by his inability to carry his own weight and manage his fatigue.

Applicant did not receive credit for his PGY4 year. Dr. Litofsky offered the support of the faculty in applicant's pursuit of a residency position in another specialty. Applicant was advised of his right to implement the grievance policy.

24. As of January 24, 2017, applicant had performed the following number of neurological surgeries: 302 adult cranial surgeries, including 280 as the lead resident surgeon and 22 as the senior resident surgeon (205 was the minimum); 376 adult spinal surgeries, including 366 as the lead resident surgeon and 10 as the senior resident surgeon (95 was the minimum); 29 pediatric neurological surgeries, including 27 as the lead resident surgeon and two as the senior resident surgeon (30 was the minimum); five adult and pediatric epilepsy surgeries, including four as the lead resident surgeon and one as the senior resident surgeon (10 was the minimum); and 170 critical care surgeries, including 166 as the lead resident surgeon and four as the senior resident surgeon (60 was the minimum).

Applicant's Testimony

25. Applicant testified with candor and credibility at hearing. When concerns were first raised about his performance during his residency training, he accepted the criticism and

worked hard to improve. Applicant was not assigned an individual attending physician as his mentor, which he feels now may have aided him. However, applicant believes that his performance improved over time based on verbal feedback and his scores on individual physician evaluations. Applicant reports that Fasil Mesfin, M.D., one of the primary faculty members in the neurosurgery division, advised him that he should be off of probation in April 2016.

26. Applicant notes that many of the individual evaluations submitted by attending physicians and senior residents demonstrate applicant's improvement over time. Applicant feels the improvements he made were overlooked due to personality conflicts; some of the residents criticized him for being a vegan and because they did not share his political views.

27. Applicant also suspects that discrimination based on his ethnicity (applicant's mother is of Lebanese descent and his father is Nicaraguan) played a role in the deterioration of his relationship with physicians in the program. On one occasion, a resident contacted the hospital security detail after learning that applicant had a permit to carry a concealed weapon. Applicant feels that security was called because of his ethnicity.

28. Applicant documented working more than 80 hours per week, which exceeded the maximum duty hours allowed by the ACGME. Applicant was criticized by senior residents for having documented his hours honestly because the ACGME had cited the program for overworking its residents.

29. Applicant felt that an air of fear and intimidation permeated the program. Applicant had difficulty getting along with several co-residents and faculty members. He notes that there were only seven residents in the program and several had resigned or been fired in recent years; two residents left as applicant started and another left the prior year. Applicant expressed his feelings about the intimidating educational environment during a site visit from the ACGME. Applicant believes that Dr. Litofsky suspected that he had made negative comments during the site visit and held it against him; their relationship deteriorated after the ACGME site visits in 2014 and 2015. In addition, applicant felt that some of the other residents viewed him as a scapegoat and sided with Dr. Litofsky to gain his favor.

30. Applicant notes that his ratings initially were consistent with his level of training; however, following the ACGME site visits, despite the improvement in feedback by physician evaluations, Dr. Litofsky's ratings of his performance deteriorated. Applicant does not agree with the lower ratings, and points to the opinions of many physicians and staff with whom he worked that found his demeanor to be pleasant and calm, and his surgical performance improving over time.

The ACGME Citations and Warnings to the Residency Program

31. On July 8, 2014, the ACGME sent a letter to Dr. Litofsky placing the neurosurgery residency program on probationary accreditation effective June 27, 2014. The basis for the adverse action involved several citations:

- a) Performance on board examinations: from 2002 to 2010, of the 15 residents who took the written examination for the first time, five failed, a pass rate of 66 percent (the national average pass rate was 90 percent). From 2007 to 2013, the pass rate dropped to 62.5 percent.

- b) Failure to provide protected time for senior residents to regularly attend a weekday conference without interruption.
- c) Service to education imbalance: during a site visit it was found that there was inappropriate balance for education and that education was compromised by service. A resident had been assigned to a three-month peripheral nerve rotation whose service obligations resulted in only 2.5 of 24 potential operating days being available.
- d) Other program personnel: in the prior five years, six clinical nurses, one nurse practitioner, one physician assistant, one administrative assistant and one residency coordinator had resigned or been fired. During the same period, the patient census had increased.
- e) Program Director Responsibilities: a significant percentage of the residents responded negatively to the 2012-2013 resident survey question related to the provision of transition care when fatigued. At the site visit, it was confirmed that the Program Director delegated scheduling resident back up to residents.
- f) Faculty Responsibilities: faculty instruction and interest in the education of residents was found to be limited.
- g) Institutional Support-Sponsoring Institution: the overall experience reported by residents was much more negative than usual. An environment of intimidation and retaliation was found to pervade the program. The Program Director was found to have questioned the residents about their statements to the ACGME during the site visit. The Senior Resident reported that residents were afraid to call the Program Director. The Program Director was found to have dressed down the residents continuously in the operating room. Grave concern was expressed that an atmosphere of fear and intimidation permeated the entire program and that the Program Director might retaliate against residents if the program were placed on probation.
- h) Faculty and Program Evaluations: resident evaluations of the faculty and program were perceived by residents not to be confidential.
- i) Duty Hours: call shifts were found to be exhausting; the Program Director was directed to monitor the demands of call shifts and adjust scheduled to mitigate excessive service demands and fatigue.

32. Effective January 8, 2016, the status of the University of Missouri neurosurgery residency program was changed to accreditation with warning. However, the citation for Institutional Support was extended. The ACGME noted that the program must provide an educational and work environment in which residents may raise and resolve issues without fear of intimidation or retaliation. On January 23, 2015, it was noted during the site visit that the environment had improved, but tension remained. On January 8, 2016, the ACGME found that the problems of fear of retaliation and intimidation had persisted. The ACGME advised the program that it placed a high importance on a supportive educational environment.

Applicant's Letters of Reference

33. Thorikild Vad Norregaard, M.D., is an Assistant Professor of Surgery in the Division of Neurosurgery at the University of Missouri. Dr. Norregaard was a supervising attending neurosurgeon while applicant was a resident in the neurosurgical training program. He was one of four of the primary faculty members in the neurosurgery division and one of applicant's main assessors. Dr. Norregaard describes applicant as demonstrating the expected general medical knowledge and judgment for his level of training; he reports that applicant practiced safe medicine and knew his professional boundaries. Dr. Norregaard observed applicant to be kind and gentle with patients. Dr. Norregaard supports applicant's licensure as a physician.

34. Dr. Mesfin, an attending physician in the University of Missouri neurosurgery residency program, wrote a letter in support of applicant's licensure. He worked closely with and directly supervised applicant, and they performed hundreds of surgeries together. Dr. Mesfin found applicant to be a caring resident with a great bedside manner. Dr. Mesfin enthusiastically supports applicant's licensure. Dr. Mesfin considers applicant to be able to practice medicine safely and competently.

35. Matthew Burton, M.D., the Chief Resident in the Neurosurgery Residency Program at the University of Missouri, wrote a letter of reference dated August 27, 2018. Dr. Burton was a senior and supervising resident with applicant. He worked closely with applicant during rounds, in the operating room and in wards. Dr. Burton worked with applicant daily for two years. In Dr. Burton's experience, applicant displayed excellent medical knowledge and decision making ability. He believes applicant possesses the inquisitive mind necessary for physicians. In Dr. Burton's observations, applicant's assessments were thoughtful and his evaluations thorough. Dr. Burton is aware that there was a level of distrust among the residents and attendings, and he assumes some of that distrust was warranted. Nevertheless Dr. Burton considers applicant to be a man of integrity and strong character who is a smart and dedicated learner.

36. Harleen Kaur Chela, M.D., is a hospitalist at the University of Missouri. Dr. Chela worked with applicant over a three-year period and consulted with him concerning numerous neurological cases. She found him to be consistently pleasant and was impressed with his knowledge, skills and dedication to the field of medicine. Dr. Chela found applicant to communicate clearly and to have excellent bedside manners. Dr. Chela noted his high USMLE and American Board of Neurological Surgery examination scores, which she found consistent with his clinical work.

37. Christopher R. Newey, D.O., M.S., an Assistant Professor in the Division of Neurology at the University of Missouri, wrote a reference letter dated March 28, 2017. Dr. Newey worked with applicant for approximately 18 months in the neurosciences intensive care unit. He reports having observed significant growth in applicant's understanding of neurocritical care, performing bedside neurosurgical and critical care procedures, and overall knowledge and understanding of managing critically-ill patients. Dr. Newey found applicant willing to learn, to be a good listener, and to ask appropriate questions. He considered applicant's lectures to be well-organized and engaging.

38. Patrick Belton, M.D., was a neurosurgical resident at the University of Missouri; he was two years behind applicant in training. Dr. Belton found applicant to be organized, efficient and calm. Dr. Belton reports that, in his opinion, applicant's dismissal from the

program resulted from: a) several neurosurgery residents hired before applicant having had prior neurosurgery experience; b) applicant having personality differences with a number of other residents; and c) the residency program as a whole having had significant issues with voluntary and involuntary attrition. Dr. Belton feels that applicant deserves a fresh start.

39. Naresh Mullaguri, M.D., wrote a letter of reference for applicant dated April 9, 2017. At the time, Dr. Mullaguri was the Chief Resident in the Department of Neurology at the University of Missouri. Dr. Mullaguri worked with applicant for four years. He views applicant as an honest, caring and dedicated professional with a good fund of knowledge. Dr. Mullaguri reports that applicant was well-liked by the nursing staff as well as patients.

40. Nitya B. Mambalam, M.D., A.B.P.N., is a neurologist who worked with applicant at the University of Missouri over a three-year period. Dr. Mambalam found applicant to be pleasant, hardworking, dedicated and a team player. Dr. Mambalam reports that applicant delivered high quality patient care.

41. Lauren O'Brien, N.P., an acute care nurse practitioner employed at the University of Missouri, Division of Neurosurgery, wrote a character reference dated August 17, 2018. O'Brien worked with applicant for approximately two years. She had no concerns with his clinical assessments or interpersonal communication skills. O'Brien attests to applicant's basic medical knowledge and his professionalism. O'Brien noted that neurosurgery did not appear to be a good fit for applicant, but she supports his efforts to practice general medicine.

42. Kyla Benson, P.A., a physician assistant at the University of Missouri, worked with applicant for just under two years. Benson reports that applicant showed an extremely high level of intellectual curiosity, independence, and self-motivation. She found applicant to display a comforting presence to patients. Benson recommends applicant highly.

43. Heather Sumowski, R.N., worked with applicant at the University of Missouri while she was a charge nurse in the Division of Neurosurgery. Sumowski describes applicant as professional and courteous, and eager to learn. She considered applicant to be an advocate for patients. Sumowski believes that applicant would be an excellent general medicine physician.

44. Michael Perkins, B.S.N., R.N., worked alongside of applicant at the University of Missouri for two years. Perkins considered applicant to be a role model based on his incredible level of patience, excellent bedside manner and passion for teaching.

45. Shannon Kehrwald, B.S.N., R.N., worked with applicant at the University of Missouri. Kehrwald found applicant to be personable and his bedside manner to be unmatched. Kehrwald observed applicant work hard to gain confidence in his abilities as a neurosurgeon.

46. Applicant rotated at CoxHealth in Springfield, Missouri, twice during his residency for a six-month total duration. Drs. Chad Morgan, J. Charles Mace, Edwin J. Cunningham, Salim Rahman, and Michael Mummert, signed a letter of reference for applicant dated August 17, 2018. They learned that applicant's contract was not renewed and that he seeks to pursue a general practice in California. Based on his performance during rotations, these physicians found him to be a capable physician and they support his application for licensure.

Dr. Cunningham wrote separately to express that he and his partners were surprised that applicant's residency was terminated. He found applicant to be respectful and diligent, and reports that the nurses and staff at CoxHealth found him to be eager, polite and responsive. Dr. Cunningham considered applicant's performance in clinic and in assessing inpatients or emergency room patients to be very solid and slightly above par as compared with other residents. Dr. Cunningham was impressed with applicant's overall intelligence, fund of knowledge and common sense judgment; however, he found his surgical skill, while solid, to be slightly behind his level of training. Dr. Cunningham suggests that it could be due to applicant's reluctance and/or by applicant not getting along well with the chief resident who determined applicant's schedule. Dr. Cunningham feels that applicant has potential to succeed as a neurosurgeon.

Dr. Mace also wrote separately in a letter dated January 1, 2017. Dr. Mace reports that he found applicant to be conscientious and to have a good base of knowledge. He agrees that applicant's technical skills improved dramatically over time. Dr. Mace would strongly support applicant pursuing another neurosurgery residency.

Chad Morgan, M.D., is the Chief of Staff at Cox Medical Center, and a staff neurosurgeon there. He wrote a letter of reference dated March 19, 2018. Dr. Morgan notes that applicant was dismissed from his neurosurgery residency based on issues with other residents and attendings that questioned his ability to complete his neurosurgery training. Dr. Morgan found applicant to be a hard worker and an honest individual who would fit into the medical field, albeit perhaps not in neurosurgery. Dr. Morgan considers applicant to be competent and compassionate, and would make a fine family medicine or general practice physician.

Mark Brown, P.A., worked with applicant during a three-month rotation at CoxHealth. He found applicant to be very respectful and professional, and observed him to make very good clinical decisions. Brown recommends applicant highly.

47. H. Mark Crabtree, M.D., is a neurosurgeon with the Springfield Neurological Institute. He worked with applicant during his two rotations at CoxHealth. Dr. Crabtree reports that he found applicant to be personable, caring, capable, disciplined and a competent physician. Dr. Crabtree considered applicant's assessments to be very sound and his work-ups complete. He noted that applicant had improved technically in the operating room and his skills were consistent with his level of training. Dr. Crabtree reports that issues with Dr. Litofsky were interpersonal and should not reflect on applicant's character or ability.

48. Orthopedic surgeon B. Israel Yahuaca, M.D., wrote a letter of reference for applicant. Dr. Yahuaca attended medical school with applicant and attended an orthopedic surgery residency at the University of Missouri when applicant was there as a neurosurgery resident. Dr. Yahuaca worked closely with applicant in medical school and they became friends. Dr. Yahuaca has observed applicant to be a hardworking, studious, responsible, kind and respectful individual, both during medical school and when they worked together during their residency training. Dr. Yahuaca supports applicant's licensure.

49. Tobias A. Mattei, M.D., F.A.A.N.S., is a neurosurgeon at the Eastern Maine Medical Center. Dr. Mattei worked closely with applicant during his medical school rotation and at the University of Illinois in 2011 and 2012. Dr. Mattei describes applicant as demonstrating refined clinical and research skills, a humble attitude and an outstanding character.

Expert Testimony by James Nuovo, M.D.

50. Complainant called James Nuovo, M.D., as an expert witness. Dr. Nuovo has been a licensed California physician since 1992. He is employed as a professor and the Residency Program Director in the Department of Family and Community Medicine at the University of California, Davis (UC Davis). He was the Program Director for the Family Medicine Residency Program at UC Davis from 1992 until 2004. He then became the Assistant Dean of Graduate Medical Education at UC Davis. In 2006, Dr. Nuovo became the Associate Dean for Graduate Medical Education and the Designated Institutional Officer at the UC Davis School of Medicine, a position he held until recently. In that position, Dr. Nuovo performed functions similar to those of the Residency Program Director, except that rather than one program, he had responsibility over all of UC Davis's residency programs. In addition, Dr. Nuovo has served as a medical consultant to the Board for over 20 years.

51. At the Board's request, Dr. Nuovo reviewed applicant's application and documents it had received from the University of Missouri neurosurgery residency program. The documents he reviewed are the kind of documents he would expect to see in a resident's file if concerns had been raised about the resident's performance.

52. Dr. Nuovo noted that in the May 17, 2015 Letter of Warning, the Program Director had identified 10 individual performance deficiencies, which are the specific areas for applicant to focus on in order to improve. The letter formally documented the concerns of the Program Director.

53. In the Program Director's October 12, 2015 evaluation, applicant was placed on probation because the concerns had not been remediated. Dr. Nuovo found the Program Director's attachment, which identified numerous examples to support each deficiency, to be significant because there were many concerns raised by a variety of different sources. A Program Director relies on these types of reports to ascertain whether the resident is meeting milestones and progressing. Dr. Nuovo noted that after being placed on probation, applicant did not avail himself of the grievance procedure.

54. The June 30, 2016 evaluation described applicant's performance at the end of his PGY3 year. It concerned Dr. Nuovo that applicant had not achieved milestones consistent with his year of training. The Program Director repeatedly identified concerns with the core competencies; applicant's abilities had not progressed with his level of training.

55. In the December 29, 2016 evaluation, similar concerns were raised based on the same deficiencies. Applicant's skills had not progressed in the core competencies. Applicant's contract was not going to be renewed and he resigned. Again, applicant chose not to implement the grievance policy.

56. Based on his review of the records from the University of Missouri, Dr. Nuovo concluded that applicant showed performance deficiencies in all core competencies and that he failed to remediate those deficiencies despite the specific examples and feedback he had received. Dr. Nuovo opined that applicant was not capable of practicing medicine safely, competently and independently. His opinion is not limited to the practice of neurosurgery because the issues were in the core competencies, and were not specific to neurosurgery.

57. Dr. Nuovo is aware that the neurosurgery residency program at the University of Missouri was on probation to the ACGME during the time applicant attended. Dr. Nuovo took into consideration the findings made by the ACGME with regard to the program; however, it did not alter his opinion of applicant's competence because he considered the concerns to be institutional, not particular to applicant. Dr. Nuovo did not speak to anyone at the University of Missouri concerning applicant. He reviewed the letters of reference obtained by applicant; they did not alter his opinions because Dr. Nuovo believes that Dr. Litofsky was in the best position to judge applicant's abilities. Applicant's high scores on the Board examinations did not alter his opinion because in his experience, some residents have difficulty transferring their medical knowledge to the clinical setting.

Applicant's Future Plans

58. After resigning from the program, applicant came to California to work for GreenTech Laboratories as a medical consultant. He worked there from July 2017 until March 2018. If he had received his medical license, he would have been offered a long-term position performing clinical research on natural, plant-based medications. Applicant lost the position when his license was denied. Since July 2018, applicant has worked as a laboratory technician at EVIO Labs in Berkeley.

59. Applicant was accepted as a clinical fellow at Lahey Medical Center in Massachusetts; he would not have received credit, but may have been able to move into a residency position following the fellowship; however, when applicant's license was denied, the offer was revoked.

60. Applicant no longer intends to pursue a career in neurosurgery. He would like to apply for another residency, possibly in radiation oncology or family medicine. He is also interested in pursuing his passion in natural and preventative medications and focusing on plant-based diets to treat cardiac disease and diabetes.

Ultimate Conclusions

61. Applicant established that a personality conflict developed between him and the Chief Resident, and between him and the Program Director. Some of the tension appears to have been from the program's probationary status during the time in question, and applicant's negative comments to the ACGME site inspectors. Nevertheless, it appears that applicant's performance during the second half of his PGY2 training forward did not meet the expectations of the program. Several physicians have commented that neurosurgery may not be the right specialty for applicant.

62. Dr. Nuovo concluded that applicant was unfit to practice as a physician based on his review of Dr. Litofsky's evaluations. The Program Director's conclusions were reached during applicant's fourth year of postgraduate training. Although the applicant successfully completed three years of training, his poor performance and concerns with how he was practicing medicine were first noted in the second half of his second year in the residency program. Indeed, while Dr. Litofsky pledged the faculty's full support in applicant's efforts to change specialties, there was no indication of any improvement or remediation over the concerns leading to applicant being placed on probationary status in the program, and ultimately to applicant's contract not being renewed. All of these factors call into question whether the applicant can practice medicine safely and

competently.

LEGAL CONCLUSIONS

1. Applicant has the burden of proving by a preponderance of the evidence that he should be granted a license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224; Evid. Code, §§ 115, 500.) Applicant has met that burden, but as will be discussed, public protection requires certain terms and conditions be placed on such a license.

First Cause for Denial: Unprofessional Conduct, Incompetence

2. Complainant alleges that applicant's application should be denied because applicant is guilty of conduct which, if done by a licentiate, would be grounds for suspension or revocation of a license, i.e., unprofessional conduct, pursuant to Business and Professions Code sections 475, subdivision (a)(4) (commission of an act which if done by a licentiate would be grounds for suspension or revocation of the license), 480, subdivision (a)(3) (commission of an act which if done by a licentiate would be grounds for suspension or revocation of the license), 2221 (unprofessional conduct) and 2234, subdivision (a) (violating the Medical Practice Act).

The examples of deficiencies cited by Dr. Litofsky were based not only on applicant's fatigue, personality conflicts with residents, and the inability to juggle the demands on his time, but also on applicant's progress through the residency program and review of his ability to deliver patient care and demonstrate the skills necessary to practice as a competent physician. Although there was no direct evidence of patient harm, Dr. Litofsky made extensive note of applicant's errors, deficiencies, and failures that were not satisfactorily remedied or improved upon by applicant since first noted in applicant's May 2015 review wherein a Letter of Warning was issued: improperly updating patient records; lack of listening and comprehension regarding patient care and patient assessment; not following instructions from peers and attending/supervising instructors and supervisors; difficulty completing responsibilities in a timely manner; difficulty linking and applying medical knowledge to clinical circumstances and patient care; failure to follow through on tasks involving patient care or other medical providers.

The board's expert, Dr. Nuovo, explained in his report that these deficiencies have a direct impact on the applicant's ability to practice medicine "safely, competently and independently." (Ex. 7, Complainant's hearing exhibit – Report of James Nuovo, M.D.) Dr. Nuovo further testified at the hearing that based on his review of the materials provided to him, including all of Dr. Litofsky's reports and updates on applicant's progress in the residency program, he "did not feel that the applicant was safe to practice – was competent, safe to practice independently... without direct supervision." (Hearing transcript, p. 51). The evidence established general unprofessional conduct or acts that would constitute grounds for discipline by a licentiate. Therefore, cause exists to deny applicant's application pursuant to Business and Professions Code sections 475, subdivision (a)(4), 480, subdivision (a)(3), 2221 and 2234, subdivision (a).

3. Complainant also alleges that applicant's application should be denied because he is incompetent. (Bus. & Prof. Code, § 2234, subd. (d).) Incompetence has been defined as a "general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission." (*James v. Bd. of Dental Examiners* (1985) 172 Cal App.3d 1096, 1109 [incompetence generally is a lack of knowledge or ability in

the discharge of professional obligations]; *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040 [term “incompetency” generally indicates an absence of qualification, ability or fitness to perform a prescribed duty or function].) As set forth in paragraph 2 of the Legal Conclusions, the board’s expert, Dr. Nuovo, concluded that applicant was not competent to safely practice independent of any direct supervision. Dr. Nuovo also testified at the administrative hearing that his negative assessment of the applicant’s knowledge and skills was not restricted to the practice of neurosurgery and that he would have the same concerns about the applicant’s ability to engage in a general medical practice. (Hearing transcript, pp. 51-52).

Dr. Litofsky documented applicant’s failure to improve in many of the areas of deficiency that involved direct patient care as well as skills necessary to competently practice medicine. These documented deficiencies were not simply omissions on applicant’s part, but rather, were indicative of the fact that he was unable to demonstrate a grasp of the skills necessary to practice medicine safely and competently. Thus, based on the evidence presented and reviewed by the Board, cause exists to deny applicant’s application pursuant to Business and Professions Code section 2234, subdivision (d).

Second Cause for Denial: Alcohol-Related Offenses

4. Complainant alleges that applicant’s application should be denied pursuant to Business and Professions Code sections 475, 480, 2221, 2234 and 2236 (conviction of any offense substantially related to the qualifications, functions or duties of a physician and surgeon constitutes unprofessional conduct) based upon his alcohol-related conviction and citation.

As set forth in Factual Findings 8 and 9, cause exists to deny applicant’s application pursuant to Business and Professions Code sections 475, 480, 2221, 2234 and 2236. Although cause exists, denial based on this misconduct is unwarranted. The incidents occurred in 2004 and 2006, when applicant was 18 and 19 years old and in college. There is no evidence that applicant requires substance abuse treatment, or that his ability to practice at this time is in any way impacted by his alcohol use. No discipline is required on these grounds in order to protect the public.

Level of Discipline

5. Having established cause for the denial of applicant’s application for a physician’s and surgeon’s certificate, the Board now turns to the issue of the appropriate penalty in this case. The task in disciplinary cases is preventative, protective and remedial, not punitive. (*In re Kelley* (1990) 52 Cal.3d 487.) While protection of the public is the board’s highest priority, action must be taken that is also calculated to aid in rehabilitation. (Bus. & Prof. Code, § 2229, subd. (b).)

6. In lieu of outright denial, Business and Professions Code section 2221 allows the board to issue a probationary physician’s and surgeon’s certificate to an applicant, subject to terms and conditions, which can include limiting practice to a supervised, structured environment where the licensee’s activities shall be supervised by another physician and surgeon.

7. Here, the applicant was able to successfully complete three (3) years of the neurosurgery residency program even though ultimately his deficiencies in various areas led to his termination from the program. The applicant has expressed a desire to work in a field outside of neurosurgery, and it is important to note that in Dr. Litofsky’s December 29, 2016 letter to the applicant removing him from the clinical neurosurgical program, Dr. Litofsky said the faculty

would support the applicant's decision to seek a residency position in another specialty.

8. Taking into account all the evidence and information in this case, the public would be adequately protected by issuing the applicant a probationary license with appropriate terms and conditions, specifically, supervised practice.

ORDER

The application of Abraham Hafiz Rodriguez is denied. However, applicant shall be issued a probationary license for two (2) years with the following terms and conditions:

1. **Monitoring/Supervision - Practice**

Respondent shall be supervised while engaging in the practice of medicine in any residency or fellowship program by one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified.

If respondent engages in the practice of medicine outside of any residency or fellowship program, thirty (30) calendar days prior to commencing such practice, respondent shall submit to the Board or its designee for prior approval as a practice monitor, the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified in the specialty in which applicant will be practicing. A monitor shall have no prior or current business or personal relationship with respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in respondent's field of practice, and must agree to serve as respondent's monitor. Respondent shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board or its designee.

Respondent shall not engage in the practice of medicine outside of any residency or fellowship program until and unless a monitor is approved to provide monitoring responsibility.

Respondent's practice shall be monitored by the approved monitor throughout probation. Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

The monitor(s) shall submit a quarterly written report to the Board or its designee which includes an evaluation of respondent's performance, indicating whether respondent's practices are within the standards of practice of medicine, and whether respondent is practicing medicine safely. It shall be the sole responsibility of respondent to ensure that the monitor submits the quarterly

written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

2. Solo Practice Prohibition

Respondent is prohibited from engaging in the solo practice of medicine. Prohibited solo practice includes, but is not limited to, a practice where: 1) respondent merely shares office space with another physician but is not affiliated for purposes of providing patient care, or 2) respondent is the sole physician practitioner at that location.

If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the effective date of this Decision, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

If, during the course of the probation, the respondent's practice setting changes and the respondent is no longer practicing in a setting in compliance with this Decision, the respondent shall notify the Board or its designee within 5 calendar days of the practice setting change. If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the practice setting change, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

3. Notification

Within seven days of the effective date of this Decision, respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change in hospitals, other facilities, or insurance carrier.

4. **Supervision of Physician Assistants and Advanced Practice Nurses.**

During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

5. **Obey All Laws.**

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

6. **Quarterly Declarations.**

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

7. **General Probation Requirements.**

Compliance with Probation Unit: Respondent shall comply with the Board's probation unit.

Address Changes: Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021, subdivision (b).

Place of Practice: Respondent shall not engage in the practice of medicine in respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal: Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California: Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than 30 calendar days. In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

8. **Interview with the Board or its Designee.**

Respondent shall be available in person upon request for interviews either at respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

9. **Non-practice While on Probation.**

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two years. Periods of non-practice will not apply to the reduction of the probationary term. Periods of non-practice for a respondent residing outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

10. **Completion of Probation.**

Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

11. **Violation of Probation.**

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

12. **License Surrender.**

Following the effective date of this Decision, if respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation,

respondent may request to surrender his license. The Board reserves the right to evaluate respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

13. **Probation Monitoring Costs.**

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

This Decision shall become effective at 5:00 p.m. on: March 22, 2019.

It is so ORDERED: February 21, 2019.



KRISTINA D. LAWSON, J.D., Chair
Panel B, Medical Board of California

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues)
Against:)

ABRAHAM HAFIZ RODRIGUEZ)

Applicant)

Case No.: 800-2018-041142

OAH No.: 2018041162

**ORDER OF NON-ADOPTION
OF PROPOSED DECISION**

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. A panel of the Medical Board of California (Board) will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit, including any argument as to whether the license should be issued, what probationary terms and conditions (if any) should be imposed to protect the public, and the sufficiency of Applicant's rehabilitative efforts. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Diamond Court Reporters, 1107 2nd Street #210, Sacramento, CA 95814. The telephone number is (916) 498-9288.


To order a copy of the exhibits, please submit a written request to this Board.

In addition, oral argument will only be scheduled if a party files a request for oral argument with the Board within 20 days from the date of this notice. If a timely request is filed, the Board will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the license should be issued and what if any terms and conditions of probation are necessary. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel. The Board directs the parties' attention to Title 16 of the California Code of Regulations, sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Board. The mailing address of the Board is as follows:

MEDICAL BOARD OF CALIFORNIA
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831
(916) 263-2349
Attention: Kristy Voong

Date: October 30, 2018


Kristina D. Lawson, J.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

ABRAHAM HAFIZ RODRIGUEZ,

Applicant.

Case No. 800-2018-041142

OAH No. 2018041162

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on August 29 and 30, 2018, in Oakland, California.

Lawrence Mercer, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California.

Marvin Firestone, M.D., Attorney at Law, represented applicant Abraham Hafiz Rodriguez, who was present.

The matter was submitted for decision on August 30, 2018.

FACTUAL FINDINGS

Introduction

1. On July 13, 2017, Abraham Hafiz Rodriguez (applicant) filed an application for a physician's and surgeon's certificate with the Medical Board of California (Board). Having concluded that applicant had deficiencies in the qualifications, functions and duties of a physician and surgeon as demonstrated by his failure to complete a neurosurgery residency, the Board denied the application on February 12, 2018.

2. Complainant Kimberly Kirchmeyer, Executive Director of the Board, filed the statement of issues in her official capacity on March 27, 2018. Applicant appealed the denial and this hearing followed.

Applicant's Education

3. Applicant earned a Bachelor of Science degree in biology at the University of Iowa in 2009. During his undergraduate education, applicant contributed over 100 volunteer hours to the University of Iowa Hospital and also worked as a nursing aide.

4. Applicant graduated from the University of Illinois College of Medicine (UICOM) in 2013. Applicant was a member of the Alpha Omega Alpha Honor Medical Society at UICOM. The Dean's Letter dated October 1, 2012, describes applicant's performance at UICOM; it reports that applicant performed at the top of his class academically, served as a representative in the student government association during all four years of medical school, and was active in the student section of the American Medical Association, becoming the president of the section at UICOM. Applicant also co-founded the Journal Club at UICOM.

Applicant participated in various community service projects while attending medical school; he helped implement events and programs for the Student Wellness Committee; completed a suicide prevention training course; was instrumental in coordinating public health screening events; and participated in food, clothing and blood drives, recycling initiatives, and youth fitness and education programs. Applicant participated in clerkships in internal medicine, pediatrics and in obstetrics and gynecology at OSF Saint Francis Medical Center; and clerkships in surgery, family medicine and psychiatry through the Rural Student Physician Program.

In 2010, applicant was selected for the Edmund James Scholar Program, an academic honors program at UICOM. Under the supervision of members of the faculty in the Department of Neurology, applicant engaged in a pilot study to investigate the effects of music on alpha and theta wave activity in the human cerebral cortex.

5. As a result of collaborating with UICOM professors, applicant published two peer reviewed articles: *True synovial cysts of the lumbar spine: an epiphenomenon of instability of the functional spine unit?*, published in Neurosurgical Review in July 2013; and *Music therapy as an adjuvant therapeutic tool in medical practice: an evidence-based summary*, published in OA Evidence-Based Medicine in April 2013.

6. Applicant passed the United States Medical Licensing Examination (USMLE) Step 1 with a score of 251 (minimum passing score was 188) on June 23, 2011. He passed the USMLE Step 2 with a score of 237 (minimum passing score was 189) on June 28, 2012. He passed the clinical skills portion on January 7, 2013. On May 27, 2014, applicant passed the USMLE Step 3 with a score of 193 (190 needed to pass).

7. Applicant was licensed as a physician and surgeon for training in the State of Missouri from 2013 until June 30, 2017; he did not apply to renew the license in 2017.

Alcohol-Related Offenses

8. On November 11, 2004, in the State of Iowa, applicant was discovered to be under the influence of alcohol in a running vehicle. He refused chemical tests. Applicant was convicted of operating a vehicle while intoxicated. Applicant was ordered to serve 48 hours in custody, complete a 12-hour drinking driver course and pay a fine of \$1,000. Applicant was 18 years old and in college at the time.

9. On February 28, 2006, applicant was cited in the State of Iowa for using false identification to purchase alcohol and for possessing alcohol under the legal age (applicant was 19 years old).

Residency Training at the University of Missouri

10. Applicant was matched to the neurosurgery residency program at the University of Missouri Division of Neurosurgery. He entered the seven-year program on July 1, 2013. The Program Director at the time was N. Scott Litofsky, M.D., F.A.C.S. (Dr. Litofsky or Program Director).

11. The purpose of a residency is to train a medical school graduate in a particular specialty. Residency programs are governed by the Accreditation Council for Graduate Medical Education (ACGME). The programs follow common rules and regulations; the curriculum is guided by specialty specific regulations.

12. The Program Director is responsible for meeting the ACGME regulations and for ensuring that residents achieve competency in the "core competencies." The core competencies were developed by the ACGME 15 years ago to provide clarity in achieving competence. The core competencies are: 1) patient care; 2) medical knowledge; 3) practice-based learning and improvement; 4) interpersonal and communication skills; 5) professionalism; and 6) systems-based practice. Several years ago the ACGME implemented milestones, which are intended to develop more specific measures of competence in the core competencies. The milestones are a work in progress currently; more specificity is underway. Program Directors are required to evaluate a resident's progress in the core competencies and milestones at least semiannually, and to provide feedback to the residents concerning their progression and areas for remediation.

13. On December 31, 2013, Dr. Litofsky wrote a letter to applicant evaluating his progress in post-graduate year one (PGY1 or internship). Dr. Litofsky rated applicant's performance in the six core competencies based on input from assessments by supervising faculty, nursing and clerical staff, and applicant's operative case log. Residents are rated in categories of "beginner," "early learner," "competent," "proficient," and "expert."

Dr. Litofsky rated applicant's patient care as between the beginner and early learner categories, and provided examples of skills in which applicant needed to improve. Dr. Litofsky rated applicant's medical knowledge as slightly above the beginner level, noting

that with further experience applicant was expected to improve. In the area of practice-based learning and improvement, Dr. Litofsky rated applicant as between the beginner and early learner levels; he recommended that applicant continue scholarship activities while at the university. Dr. Litofsky rated applicant at the level of early learner in the category of interpersonal and communication skills, and recommended that applicant refrain from arguing points with others. Applicant was rated as between early learner and competent in the category of professionalism, and as early learner in systems-based practice. Dr. Litofsky concluded by noting that applicant's milestones for the array of competencies were appropriate for his level of training, he was proud to have applicant in the program and looked forward to his continued development.

14. On June 16, 2014, Dr. Litofsky again evaluated applicant's progress. He found applicant's performance to be appropriate for his level of training. He reiterated that applicant needed to engage in scholarship activities at the university. Dr. Litofsky noted that applicant's operative case log showed minor procedure numbers that were somewhat below expected. Dr. Litofsky rated applicant as follows: patient care – beginner; medical knowledge, practice-based learning and improvement, interpersonal and communication skills, and professionalism – early learner; and systems-based practice – between beginner and early learner. Applicant had successfully completed his PGY1 training.

15. Applicant took the 2014 American Board of Neurological Surgery Primary Examination for practice, not for credit. He received a score of 222; a score of 286 was needed to pass. Dr. Litofsky commended applicant for scoring quite well on this examination for his level of training.

16. On December 29, 2014, Dr. Litofsky provided applicant with an evaluation of the first half of his PGY2 training. Dr. Litofsky reported that applicant was on track for his level of training; he recommended additional focus on areas applicant had mentioned in his self-assessment. The major concern expressed by the faculty was sleepiness that applicant demonstrated in conferences, in the operating room and during meetings. Dr. Litofsky recommended that applicant be assessed by a professional for sleep hygiene. On the core competencies, Dr. Litofsky rated applicant as between beginner and early learner stages for patient care and practice-based learning and improvement, and at early learner in the remainder of the core competencies.

17. Applicant took the 2015 American Board of Neurological Surgery Primary Examination, again for practice. He received a score of 300; a score of 311 was needed to pass. Dr. Litofsky considered this to be an excellent score for applicant's level of training; however, he raised a concern with applicant's ability to translate his knowledge to the clinical setting.

MAY 17, 2015 LETTER OF WARNING

18. On May 17, 2015, Dr. Litofsky evaluated applicant's progress in the second half of his PGY2 training. For the first time, Dr. Litofsky reported that applicant's

performance was well below the level of a resident at that point in training. He issued applicant a Letter of Warning to highlight the importance of prompt correction of deficiencies. Dr. Litofsky rated applicant at the beginner level in the six competencies. He provided detailed examples of applicant's deficiencies in each category. Many of the complaints involved applicant's perceived ineffective communications skills and an inability to be a team player. Dr. Litofsky again encouraged applicant to engage in scholarship activities with members of the faculty. He noted that applicant's surgical experience was somewhat hampered by the program being unable to schedule a rotation for applicant at CoxHealth in Springfield, and the need for applicant to stand in for a physician's assistant who had left the division; nevertheless, he cautioned applicant that he needed to: 1) improve his listening skills; 2) timely accomplish tasks; 3) reduce unnecessary activities; 4) follow instructions from senior peers; 5) be on time; 6) participate as a team member; 7) pay attention on rounds; 8) identify the key elements of patients' imaging and physical examination and integrate them into an appropriate diagnostic inventory; 9) effectively communicate to senior residents and attendings; and 10) learn to prioritize tasks so as to stay focused.

OCTOBER 12, 2015 PROBATIONARY STATUS

19. On October 12, 2015, Dr. Litofsky placed applicant on probation. He reported that over the previous three months applicant's rotations had been tailored to give a number of faculty members an opportunity for direct educational contact with him so that deficiencies could be pointed out and discussed immediately. Dr. Litofsky reported that applicant had continued to perform well below a resident in his third year of postgraduate training. He attached a list of the 10 items identified in the Letter of Warning accompanied by examples of the deficiencies observed.

Typical examples included the following: placing the informed consent in the wrong patient medical record; miscommunicating his role to the chief resident; placing a compact disc in a phantom chart instead of giving it to the clinical nurse as instructed; forgetting a conference discussion; forgetting which side of a planned biopsy was discussed the day prior; failing to discuss a case until 7:30 p.m.; failing to update an attending after morning rounds until 12:45 p.m.; presenting too much minutiae during clinic presentations; arguing with an attending physician; being late to rounds; parking in the visitor garage; failing to perform a fundi examination on a patient; and falling asleep in the middle of a case.

Dr. Litofsky advised applicant that the faculty remained hopeful that he would be able to appropriately address their concerns. However, the faculty felt that a specialty such as neurosurgery, which requires meticulous attention to detail, timely accomplishment of tasks, clearly following instructions, effective communication, and prioritization of critical tasks, might not be the best career choice for applicant. Dr. Litofsky strongly advised applicant to consider other options and pledged the support of the faculty if applicant chose to change his specialty.

20. On December 31, 2015, Dr. Litofsky evaluated applicant's performance from July through December 2015. He reported that applicant had improved to the early learner stage in the categories of medical knowledge, practice-based learning and improvement, interpersonal and communication skills, professionalism and systems-based practice. He rated applicant at between beginner and early learner in patient care. Dr. Litofsky found applicant's operative case log to be appropriate. He commented that applicant was bright and willing to do the work to be a successful physician and neurosurgeon. Dr. Litofsky reported applicant's weaknesses to include a difficulty in focusing on the key points of medical knowledge and patient care. He also found applicant to be somewhat robotic in his technical components of following instruction. Applicant had improved in the 10 areas of concern, but still needed to develop. His probation was continued.

21. Applicant took the 2016 American Board of Neurological Surgery Primary Examination for credit; he passed with an extremely high score of 505; a score of 311 was passing.

22. On June 30, 2016, Dr. Litofsky evaluated applicant's performance between January and June 2016. Dr. Litofsky reiterated concerns with applicant's ability to focus and apply his medical knowledge in the clinical setting. Applicant's score on patient care, practice-based learning and improvement, interpersonal and communication skills, and systems-based practice remained between beginner and early learner; his professionalism was at early learner. Applicant's operative case log was satisfactory. Dr. Litofsky concluded by stating that the faculty still had significant concerns about his ability to become a successful neurosurgeon, citing applicant's inability to interface well with peers and follow instructions of the faculty in the stressful work environment of neurosurgery. Applicant was assessed at well below his entire peer group. Applicant was cautioned that he needed to demonstrate significant improvement in his character to gain the trust of the faculty.

DECEMBER 29, 2016: FINAL EVALUATION

23. On December 29, 2016, Dr. Litofsky advised applicant that based on the assessment of his progress from July to December 2016, his contract would not be renewed and he was being removed from the clinical neurosurgical service. Dr. Litofsky described applicant as failing to improve in the six competencies and provided examples of applicant's continued deficiencies. In patient care, for example, Dr. Litofsky stated that applicant continued to be "unable to grasp the big picture," missed "key neurological findings," "provided poor transition of care," and difficulty completing responsibilities in a timely manner. With regard to medical knowledge, he found applicant had difficulty linking his knowledge to clinical circumstances. Concerns in practice-based learning and improvement were that applicant failed to engage in scholarly activities. With regard to interpersonal and communication skills, Dr. Litofsky reported, among other things, that applicant had made errors in documentation and failed to follow through on tasks, and that the faculty did not trust applicant to provide reliable information. Dr. Litofsky also stated that applicant's professionalism was hurt by his inability to carry his own weight and manage his fatigue.

Applicant did not receive credit for his PGY4 year. Dr. Litofsky offered the support of the faculty in applicant's pursuit of a residency position in another specialty. Applicant was advised of his right to implement the grievance policy.

24. As of January 24, 2017, applicant had performed the following number of neurological surgeries: 302 adult cranial surgeries, including 280 as the lead resident surgeon and 22 as the senior resident surgeon (205 was the minimum); 376 adult spinal surgeries, including 366 as the lead resident surgeon and 10 as the senior resident surgeon (95 was the minimum); 29 pediatric neurological surgeries, including 27 as the lead resident surgeon and two as the senior resident surgeon (30 was the minimum); five adult and pediatric epilepsy surgeries, including four as the lead resident surgeon and one as the senior resident surgeon (10 was the minimum); and 170 critical care surgeries, including 166 as the lead resident surgeon and four as the senior resident surgeon (60 was the minimum).

Applicant's Testimony

25. Applicant testified with candor and credibility at hearing. When concerns were first raised about his performance during his residency training, he accepted the criticism and worked hard to improve. Applicant was not assigned an individual attending physician as his mentor, which he feels now may have aided him. However, applicant believes that his performance improved over time based on verbal feedback and his scores on individual physician evaluations. Applicant reports that Fasil Mesfin, M.D., one of the primary faculty members in the neurosurgery division, advised him that he should be off of probation in April 2016.

26. Applicant notes that many of the individual evaluations submitted by attending physicians and senior residents demonstrate applicant's improvement over time. Applicant feels the improvements he made were overlooked due to personality conflicts; some of the residents criticized him for being a vegan and because they did not share his political views.

27. Applicant also suspects that discrimination based on his ethnicity (applicant's mother is of Lebanese descent and his father is Nicaraguan) played a role in the deterioration of his relationship with physicians in the program. On one occasion, a resident contacted the hospital security detail after learning that applicant had a permit to carry a concealed weapon. Applicant feels that security was called because of his ethnicity.

28. Applicant documented working more than 80 hours per week, which exceeded the maximum duty hours allowed by the ACGME. Applicant was criticized by senior residents for having documented his hours honestly because the ACGME had cited the program for overworking its residents.

29. Applicant felt that an air of fear and intimidation permeated the program. Applicant had difficulty getting along with several co-residents and faculty members. He notes that there were only seven residents in the program and several had resigned or been fired in recent years; two residents left as applicant started and another left the prior year.

Applicant expressed his feelings about the intimidating educational environment during a site visit from the ACGME. Applicant believes that Dr. Litofsky suspected that he had made negative comments during the site visit and held it against him; their relationship deteriorated after the ACGME site visits in 2014 and 2015. In addition, applicant felt that some of the other residents viewed him as a scapegoat and sided with Dr. Litofsky to gain his favor.

30. Applicant notes that his ratings initially were consistent with his level of training; however, following the ACGME site visits, despite the improvement in feedback by physician evaluations, Dr. Litofsky's ratings of his performance deteriorated. Applicant does not agree with the lower ratings, and points to the opinions of many physicians and staff with whom he worked that found his demeanor to be pleasant and calm, and his surgical performance improving over time.

The ACGME Citations and Warnings to the Residency Program

31. On July 8, 2014, the ACGME sent a letter to Dr. Litofsky placing the neurosurgery residency program on probationary accreditation effective June 27, 2014. The basis for the adverse action involved several citations:

- a) Performance on board examinations: from 2002 to 2010, of the 15 residents who took the written examination for the first time, five failed, a pass rate of 66 percent (the national average pass rate was 90 percent). From 2007 to 2013, the pass rate dropped to 62.5 percent.
- b) Failure to provide protected time for senior residents to regularly attend a weekday conference without interruption.
- c) Service to education imbalance: during a site visit it was found that there was inappropriate balance for education and that education was compromised by service. A resident had been assigned to a three-month peripheral nerve rotation whose service obligations resulted in only 2.5 of 24 potential operating days being available.
- d) Other program personnel: in the prior five years, six clinical nurses, one nurse practitioner, one physician assistant, one administrative assistant and one residency coordinator had resigned or been fired. During the same period, the patient census had increased.
- e) Program Director Responsibilities: a significant percentage of the residents responded negatively to the 2012-2013 resident survey question related to the provision of transition care when fatigued. At the site visit, it was confirmed that the Program Director delegated scheduling resident back up to residents.
- f) Faculty Responsibilities: faculty instruction and interest in the education of residents was found to be limited.

- g) Institutional Support-Sponsoring Institution: the overall experience reported by residents was much more negative than usual. An environment of intimidation and retaliation was found to pervade the program. The Program Director was found to have questioned the residents about their statements to the ACGME during the site visit. The Senior Resident reported that residents were afraid to call the Program Director. The Program Director was found to have dressed down the residents continuously in the operating room. Grave concern was expressed that an atmosphere of fear and intimidation permeated the entire program and that the Program Director might retaliate against residents if the program were placed on probation.
- h) Faculty and Program Evaluations: resident evaluations of the faculty and program were perceived by residents not to be confidential.
- i) Duty Hours: call shifts were found to be exhausting; the Program Director was directed to monitor the demands of call shifts and adjust scheduled to mitigate excessive service demands and fatigue.

32. Effective January 8, 2016, the status of the University of Missouri neurosurgery residency program was changed to accreditation with warning. However, the citation for Institutional Support was extended. The ACGME noted that the program must provide an educational and work environment in which residents may raise and resolve issues without fear of intimidation or retaliation. On January 23, 2015, it was noted during the site visit that the environment had improved, but tension remained. On January 8, 2016, the ACGME found that the problems of fear of retaliation and intimidation had persisted. The ACGME advised the program that it placed a high importance on a supportive educational environment.

Applicant's Letters of Reference

33. Thorkild Vad Norregaard, M.D., is an Assistant Professor of Surgery in the Division of Neurosurgery at the University of Missouri. Dr. Norregaard was a supervising attending neurosurgeon while applicant was a resident in the neurosurgical training program. He was one of four of the primary faculty members in the neurosurgery division and one of applicant's main assessors. Dr. Norregaard describes applicant as demonstrating the expected general medical knowledge and judgment for his level of training; he reports that applicant practiced safe medicine and knew his professional boundaries. Dr. Norregaard observed applicant to be kind and gentle with patients. Dr. Norregaard supports applicant's licensure as a physician.

34. Dr. Mesfin, an attending physician in the University of Missouri neurosurgery residency program, wrote a letter in support of applicant's licensure. He worked closely with and directly supervised applicant, and they performed hundreds of surgeries together. Dr. Mesfin found applicant to be a caring resident with a great bedside manner. Dr. Mesfin

enthusiastically supports applicant's licensure. Dr. Mesfin considers applicant to be able to practice medicine safely and competently.

35. Matthew Burton, M.D., the Chief Resident in the Neurosurgery Residency Program at the University of Missouri, wrote a letter of reference dated August 27, 2018. Dr. Burton was a senior and supervising resident with applicant. He worked closely with applicant during rounds, in the operating room and in wards. Dr. Burton worked with applicant daily for two years. In Dr. Burton's experience, applicant displayed excellent medical knowledge and decision making ability. He believes applicant possesses the inquisitive mind necessary for physicians. In Dr. Burton's observations, applicant's assessments were thoughtful and his evaluations thorough. Dr. Burton is aware that there was a level of distrust among the residents and attendings, and he assumes some of that distrust was warranted. Nevertheless Dr. Burton considers applicant to be a man of integrity and strong character who is a smart and dedicated learner.

36. Harleen Kaur Chela, M.D., is a hospitalist at the University of Missouri. Dr. Chela worked with applicant over a three-year period and consulted with him concerning numerous neurological cases. She found him to be consistently pleasant and was impressed with his knowledge, skills and dedication to the field of medicine. Dr. Chela found applicant to communicate clearly and to have excellent bedside manners. Dr. Chela noted his high USMLE and American Board of Neurological Surgery examination scores, which she found consistent with his clinical work.

37. Christopher R. Newey, D.O., M.S., an Assistant Professor in the Division of Neurology at the University of Missouri, wrote a reference letter dated March 28, 2017. Dr. Newey worked with applicant for approximately 18 months in the neurosciences intensive care unit. He reports having observed significant growth in applicant's understanding of neurocritical care, performing bedside neurosurgical and critical care procedures, and overall knowledge and understanding of managing critically-ill patients. Dr. Newey found applicant willing to learn, to be a good listener, and to ask appropriate questions. He considered applicant's lectures to be well-organized and engaging.

38. Patrick Belton, M.D., was a neurosurgical resident at the University of Missouri; he was two years behind applicant in training. Dr. Belton found applicant to be organized, efficient and calm. Dr. Belton reports that, in his opinion, applicant's dismissal from the program resulted from: a) several neurosurgery residents hired before applicant having had prior neurosurgery experience; b) applicant having personality differences with a number of other residents; and c) the residency program as a whole having had significant issues with voluntary and involuntary attrition. Dr. Belton feels that applicant deserves a fresh start.

39. Naresh Mullaguri, M.D., wrote a letter of reference for applicant dated April 9, 2017. At the time, Dr. Mullaguri was the Chief Resident in the Department of Neurology at the University of Missouri. Dr. Mullaguri worked with applicant for four years. He views

applicant as an honest, caring and dedicated professional with a good fund of knowledge. Dr. Mullaguri reports that applicant was well-liked by the nursing staff as well as patients.

40. Nitya B. Mambalam, M.D., A.B.P.N., is a neurologist who worked with applicant at the University of Missouri over a three-year period. Dr. Mambalam found applicant to be pleasant, hardworking, dedicated and a team player. Dr. Mambalam reports that applicant delivered high quality patient care.

41. Lauren O'Brien, N.P., an acute care nurse practitioner employed at the University of Missouri Division of Neurosurgery, wrote a character reference dated August 17, 2018. O'Brien worked with applicant for approximately two years. She had no concerns with his clinical assessments or interpersonal communication skills. O'Brien attests to applicant's basic medical knowledge and his professionalism. O'Brien noted that neurosurgery did not appear to be a good fit for applicant, but she supports his efforts to practice general medicine.

42. Kyla Benson, P.A., a physician assistant at the University of Missouri, worked with applicant for just under two years. Benson reports that applicant showed an extremely high level of intellectual curiosity, independence, and self-motivation. She found applicant to display a comforting presence to patients. Benson recommends applicant highly.

43. Heather Sumowski, R.N., worked with applicant at the University of Missouri while she was a charge nurse in the Division of Neurosurgery. Sumowski describes applicant as professional and courteous, and eager to learn. She considered applicant to be an advocate for patients. Sumowski believes that applicant would be an excellent general medicine physician.

44. Michael Perkins, B.S.N., R.N., worked alongside of applicant at the University of Missouri for two years. Perkins considered applicant to be a role model based on his incredible level of patience, excellent bedside manner and passion for teaching.

45. Shannon Kehrwald, B.S.N., R.N., worked with applicant at the University of Missouri. Kehrwald found applicant to be personable and his bedside manner to be unmatched. Kehrwald observed applicant work hard to gain confidence in his abilities as a neurosurgeon.

46. Applicant rotated at CoxHealth in Springfield, Missouri, twice during his residency for a six-month total duration. Drs. Chad Morgan, J. Charles Mace, Edwin J. Cunningham, Salim Rahman, and Michael Mummert, signed a letter of reference for applicant dated August 17, 2018. They learned that applicant's contract was not renewed and that he seeks to pursue a general practice in California. Based on his performance during rotations, these physicians found him to be a capable physician and they support his application for licensure.

Dr. Cunningham wrote separately to express that he and his partners were surprised that applicant's residency was terminated. He found applicant to be respectful and diligent, and reports that the nurses and staff at CoxHealth found him to be eager, polite and responsive. Dr. Cunningham considered applicant's performance in clinic and in assessing inpatients or emergency room patients to be very solid and slightly above par as compared with other residents. Dr. Cunningham was impressed with applicant's overall intelligence, fund of knowledge and common sense judgment; however, he found his surgical skill, while solid, to be slightly behind his level of training. Dr. Cunningham suggests that it could be due to applicant's reluctance and/or by applicant not getting along well with the chief resident who determined applicant's schedule. Dr. Cunningham feels that applicant has potential to succeed as a neurosurgeon.

Dr. Mace also wrote separately in a letter dated January 1, 2017. Dr. Mace reports that he found applicant to be conscientious and to have a good base of knowledge. He agrees that applicant's technical skills improved dramatically over time. Dr. Mace would strongly support applicant pursuing another neurosurgery residency.

Chad Morgan, M.D., is the Chief of Staff at Cox Medical Center, and a staff neurosurgeon there. He wrote a letter of reference dated March 19, 2018. Dr. Morgan notes that applicant was dismissed from his neurosurgery residency based on issues with other residents and attendings that questioned his ability to complete his neurosurgery training. Dr. Morgan found applicant to be a hard worker and an honest individual who would fit into the medical field, albeit perhaps not in neurosurgery. Dr. Morgan considers applicant to be competent and compassionate, and would make a fine family medicine or general practice physician.

Mark Brown, P.A., worked with applicant during a three-month rotation at CoxHealth. He found applicant to be very respectful and professional, and observed him to make very good clinical decisions. Brown recommends applicant highly.

47. H. Mark Crabtree, M.D., is a neurosurgeon with the Springfield Neurological Institute. He worked with applicant during his two rotations at CoxHealth. Dr. Crabtree reports that he found applicant to be personable, caring, capable, disciplined and a competent physician. Dr. Crabtree considered applicant's assessments to be very sound and his work-ups complete. He noted that applicant had improved technically in the operating room and his skills were consistent with his level of training. Dr. Crabtree reports that issues with Dr. Litofsky were interpersonal and should not reflect on applicant's character or ability.

48. Orthopedic surgeon B. Israel Yahuaca, M.D., wrote a letter of reference for applicant. Dr. Yahuaca attended medical school with applicant and attended an orthopedic surgery residency at the University of Missouri when applicant was there as a neurosurgery resident. Dr. Yahuaca worked closely with applicant in medical school and they became friends. Dr. Yahuaca has observed applicant to be a hardworking, studious, responsible, kind and respectful individual, both during medical school and when they worked together during their residency training. Dr. Yahuaca supports applicant's licensure.

49. Tobias A. Mattei, M.D., F.A.A.N.S., is a neurosurgeon at the Eastern Maine Medical Center. Dr. Mattei worked closely with applicant during his medical school rotation and at the University of Illinois in 2011 and 2012. Dr. Mattei describes applicant as demonstrating refined clinical and research skills, a humble attitude and an outstanding character.

Expert Testimony by James Nuovo, M.D.

50. Complainant called James Nuovo, M.D., as an expert witness. Dr. Nuovo has been a licensed California physician since 1992. He is employed as a professor and the Residency Program Director in the Department of Family and Community Medicine at the University of California, Davis (UC Davis). He was the Program Director for the Family Medicine Residency Program at UC Davis from 1992 until 2004. He then became the Assistant Dean of Graduate Medical Education at UC Davis. In 2006, Dr. Nuovo became the Associate Dean for Graduate Medical Education and the Designated Institutional Officer at the UC Davis School of Medicine, a position he held until recently. In that position, Dr. Nuovo performed functions similar to those of the Residency Program Director, except that rather than one program, he had responsibility over all of UC Davis's residency programs. In addition, Dr. Nuovo has served as a medical consultant to the Board for over 20 years.

51. At the Board's request, Dr. Nuovo reviewed applicant's application and documents it had received from the University of Missouri neurosurgery residency program. The documents he reviewed are the kind of documents he would expect to see in a resident's file if concerns had been raised about the resident's performance.

52. Dr. Nuovo noted that in the May 17, 2015 Letter of Warning, the Program Director had identified 10 individual performance deficiencies, which are the specific areas for applicant to focus on in order to improve. The letter formally documented the concerns of the Program Director.

53. In the Program Director's October 12, 2015 evaluation, applicant was placed on probation because the concerns had not been remediated. Dr. Nuovo found the Program Director's attachment, which identified numerous examples to support each deficiency, to be significant because there were many concerns raised by a variety of different sources. A Program Director relies on these types of reports to ascertain whether the resident is meeting milestones and progressing. Dr. Nuovo noted that after being placed on probation, applicant did not avail himself of the grievance procedure.

54. The June 30, 2016 evaluation described applicant's performance at the end of his PGY3 year. It concerned Dr. Nuovo that applicant had not achieved milestones consistent with his year of training. The Program Director repeatedly identified concerns with the core competencies; applicant's abilities had not progressed with his level of training.

55. In the December 29, 2016 evaluation, similar concerns were raised based on the same deficiencies. Applicant's skills had not progressed in the core competencies.

Applicant's contract was not going to be renewed and he resigned. Again, applicant chose not to implement the grievance policy.

56. Based on his review of the records from the University of Missouri, Dr. Nuovo concluded that applicant showed performance deficiencies in all core competencies and that he failed to remediate those deficiencies despite the specific examples and feedback he had received. Dr. Nuovo opined that applicant was not capable of practicing medicine safely, competently and independently. His opinion is not limited to the practice of neurosurgery because the issues were in the core competencies, and were not specific to neurosurgery.

57. Dr. Nuovo is aware that the neurosurgery residency program at the University of Missouri was on probation to the ACGME during the time applicant attended. Dr. Nuovo took into consideration the findings made by the ACGME with regard to the program; however, it did not alter his opinion of applicant's competence because he considered the concerns to be institutional, not particular to applicant. Dr. Nuovo did not speak to anyone at the University of Missouri concerning applicant. He reviewed the letters of reference obtained by applicant; they did not alter his opinions because Dr. Nuovo believes that Dr. Litofsky was in the best position to judge applicant's abilities. Applicant's high scores on the Board examinations did not alter his opinion because in his experience, some residents have difficulty transferring their medical knowledge to the clinical setting.

Applicant's Future Plans

58. After resigning from the program, applicant came to California to work for GreenTech Laboratories as a medical consultant. He worked there from July 2017 until March 2018. If he had received his medical license, he would have been offered a long-term position performing clinical research on natural, plant-based medications. Applicant lost the position when his license was denied. Since July 2018, applicant has worked as a laboratory technician at EVIO Labs in Berkeley.

59. Applicant was accepted as a clinical fellow at Lahey Medical Center in Massachusetts; he would not have received credit, but may have been able to move into a residency position following the fellowship; however, when applicant's license was denied, the offer was revoked.

60. Applicant no longer intends to pursue a career in neurosurgery. He would like to apply for another residency, possibly in radiation oncology or family medicine. He is also interested in pursuing his passion in natural and preventative medications and focusing on plant-based diets to treat cardiac disease and diabetes.

Ultimate Conclusions

61. Applicant established that a personality conflict developed between him and the Chief Resident, and between him and the Program Director. Some of the tension appears to have been from the program's probationary status during the time in question, and applicant's

negative comments to the ACGME site inspectors. Nevertheless, it appears that applicant's performance during the second half of his PGY2 training forward did not meet the expectations of the program. Several physicians have commented that neurosurgery may not be the right specialty for applicant.

62. Dr. Nuovo is very well-qualified to opine on a resident's experience. However, his review was limited to the Program Director's evaluations. Dr. Nuovo disregarded the ACGME findings that the educational environment was permeated with fear and intimidation and that the Program Director had an interest in who had made negative comments during site visits because he felt that the ACGME findings pertained to the institution as a whole rather than to applicant. It is noted, however, that there were only seven residents in the program and that Dr. Litofsky's opinion about applicant's progress in the program seemed to deteriorate after the ACGME site visits.

63. Dr. Nuovo inferred that applicant was unfit to practice as a physician from Dr. Litofsky's evaluations. The Program Director's conclusions were reached during applicant's fourth year of postgraduate training. Applicant successfully completed three years of training and no one in the residency program, including the Program Director, found applicant unfit to be a medical doctor. Indeed, Dr. Litofsky pledged the faculty's full support in applicant's efforts to change specialties. The letters from other faculty members and attending physicians, the opinions of the physicians from Cox Medical Center, applicant's achievements in medical school and his passage of board examinations are consistent with Dr. Litofsky's suggestion that applicant should continue his work as a physician, but may be better suited to a specialty other than neurosurgery.

64. Although legitimate questions were raised concerning whether applicant should pursue a career as a neurosurgeon, there is a significant gap between the failure to progress in a neurosurgery residency and the lack of competence as a physician. Dr. Nuovo did not have the opportunity to practice alongside of applicant or to observe him in practice, and yet, he is the only physician to opine that applicant is unfit to practice medicine. The opinions of the physicians who did observe applicant over a period of years are more persuasive on the point of whether applicant is competent to practice medicine without direct supervision.

LEGAL CONCLUSIONS

1. Applicant has the burden of proving by a preponderance of the evidence that he should be granted a license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224; Evid. Code, §§ 115, 500.) Applicant has met that burden.

First Cause for Denial: Unprofessional Conduct, Incompetence

2. Complainant alleges that applicant's application should be denied because applicant is guilty of conduct which, if done by a licensee, would be grounds for suspension or revocation of a license, i.e., unprofessional conduct, pursuant to Business and Professions Code

sections 475, subdivision (a)(4) (commission of an act which if done by a licensee would be grounds for suspension or revocation of the license), 480, subdivision (a)(3) (commission of an act which if done by a licensee would be grounds for suspension or revocation of the license), 2221 (unprofessional conduct) and 2234, subdivision (a) (violating the Medical Practice Act).

The examples of deficiencies cited by Dr. Litofsky were largely based on applicant's fatigue, personality conflicts with residents and the inability to juggle the demands on his time. No examples of poor patient care were established by competent evidence. The evidence did not establish that applicant violated the Medical Practice Act, or committed general unprofessional conduct or acts which would constitute grounds for discipline by a licensee. Cause for denial of applicant's application pursuant to Business and Professions Code sections 475, subdivision (a)(4), 480, subdivision (a)(3), 2221 and 2234, subdivision (a), was not established.

3. Complainant also alleges that applicant's application should be denied because he is incompetent. (Bus. & Prof. Code, § 2234, subd. (d).) Incompetence has been defined as a "general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission." (*James v. Bd. of Dental Examiners* (1985) 172 Cal App.3d 1096, 1109 [incompetence generally is a lack of knowledge or ability in the discharge of professional obligations]; *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040 [term "incompetency" generally indicates an absence of qualification, ability or fitness to perform a prescribed duty or function].)

Applicant graduated after attending four years of medical school in the United States; he passed the USMLE examinations; and he successfully completed three years of postgraduate training. (Business and Professions Code section 2096 requires one year of postgraduate training in an ACGME accredited residency program for applicants who attended four years of medical school in the United States.) Applicant may not be well-suited for a career as a neurosurgeon; however, applicant established significant evidence to support his ability to practice general medicine. The evidence did not establish that applicant is incompetent. (Factual Findings 61 through 64.) Cause for denial of applicant's application pursuant to Business and Professions Code section 2234, subdivision (d), was not established.

Second Cause for Denial: Alcohol-Related Offenses

4. Complainant alleges that applicant's application should be denied pursuant to Business and Professions Code sections 475, 480, 2221, 2234 and 2236 (conviction of any offense substantially related to the qualifications, functions or duties of a physician and surgeon constitutes unprofessional conduct) based upon his alcohol-related conviction and citation.

As set forth in Factual Findings 8 and 9, cause exists to deny applicant's application pursuant to Business and Professions Code sections 475, 480, 2221, 2234 and 2236. Although cause exists, denial based on this misconduct is unwarranted. The incidents occurred in 2004 and 2006, when applicant was 18 and 19 years old and in college. There is no evidence that applicant requires substance abuse treatment, or that his ability to practice at this time is in any

way impacted by his alcohol use. No discipline is required on these grounds in order to protect the public.

ORDER

The application of Abraham Hafiz Rodriguez is granted.

DATED: September 27, 2018

DocuSigned by:

Jill Schlichtmann

D0097D940B484D9...

JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings